No. 93-239

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

BRIAN M. BARTLEY,

Petitioner,

v.

RICHARD A. HANDELSMAN &
HANDELSMAN VENTURE GROUP,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE 6TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in granting Summary Judgment as to Count I?

II. Did the Court of Appeals err in granting Summary Judgment as to Count II?

III. Did the Court of Appeals err in ruling that no genuine issue of material fact exists?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the 6th Circuit.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE 6TH CIRCUIT

BRIAN M. BARTLEY, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the 6th Circuit, entered in the above-entitled case on May 27, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals herein sought to be reviewed is reprinted in the Appendix to this Petition at Page 1. That opinion was filed April 19, 1993 and was "issued as mandate" on May 27, 1993.

Petitioner filed a timely Petition for Rehearing pursuant to FRAP 40 on April 29, 1993.

By order filed May 19, 1993 that Petition was denied. A copy of the Order denying Plaintiff's Petition for Rehearing is reprinted in the Appendix to this Petition at Page 17.

The prior Order of the United States District Court for the Eastern District of Michigan, Southern Division, entered September 5, 1991 is reprinted in the Appendix to this Petition at Page 18.

On September 10, 1991, Plaintiff petitioned for reconsideration of that Order. By Order of October 2, 1991, the District Court denied that Motion for Reconsideration. A copy of that Order appears at Page 20 of the Appendix to

this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on May 27, 1993. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution, 14th Amend., Sec. 1

28 USC 1332 (a)(1)

28 USC 1254 (1)

SCR 10

FRCP 56 (a) and (c)

FRAP 40

See Appendix pages 22 through 29 for verbatim provisions of the foregoing.

STATEMENT OF THE CASE

Plaintiff's sworn Complaint was originally filed in the Circuit Court for the County of Washtenaw, State of Michigan. Defendants removed the case to the United States District Court for the Eastern District of Michigan because of the diversity of citizenship of the parties, the amount in controversy being in excess of $50,000. [28 USC 1332 (a)(1)]

His sworn Complaint alleges that in June of 1988 Plaintiff, one MICHAEL H. OESTERLE (OESTERLE) and Defendant RICHARD A. HANDELSMAN (HANDELSMAN) embarked upon a joint venture now known as HANDELSMAN VENTURE GROUP (HVG). That joint venture was formed for the purpose of identifying, evaluating, acquiring, structuring, promoting, selling and managing various oil and gas drilling programs for the financial benefit of the venture.

Plaintiff's responsibilities as a member of that venture were to research, evaluate, identify and introduce to the venture, oil and

as drilling prospects. HANDELSMAN was to rovide the necessary capital to acquire and romote those drilling prospects.

As compensation for his participation in nd contributions to the joint venture, laintiff was to receive a 10% "carried" nterest in and to all oil and gas drilling rospects introduced by him and acquired by HVG, $2,000 per month draw, and reimbursement for xpenses incurred. (R.33: BARTLEY Dep. of /29/90 pp. 51-55, 115, 129-131 and Exhibit 1 hereto, p. 13; R.34: OESTERLE Dep. pp. 35-55) All citations herein are to the record before he 6th Circuit Court of Appeals.) Defendants haracterize the $2,000 monthly payments eceived by Plaintiff as "salary" for services endered. Neither Plaintiff nor witness ESTERLE characterized those payments as such. hey described the payments as an agreed upon draw", an advance against profits for dditional unanticipated and uncompensated work one by Plaintiff after his introduction of both

the Trendwell and Ward Lake Prospects to the venture. (R. 33: BARTLEY Dep. of 8/29/90 pp. 130-132; R. 34: OESTERLE Dep. p. 116) The record clearly reflects that no such "draw" payments were involved in the parties relationship until September of 1988. At that time, having cleared the matter with Defendant HANDELSMAN, OESTERLE suggested that since Plaintiff's services had far exceeded those originally anticipated as his contribution to the venture, he should be paid compensation over and above that discussed at the formative meeting. In recognition of his exceptional contributions to the venture, the Plaintiff was paid the sum of $2,000 per month as a "draw", retroactive to June of 1988, commencing in September of 1988. (R. 33; R. 34: OESTERLE Dep. pp. 114-124)

During the period between April of 1988 and June of 1989 Plaintiff identified, researched, evaluated and introduced to HVG a substantial number of oil and gas drilling prospects,

expending considerable time, effort and money in so doing. (R.42: BARTLEY Dep. of 8/29/90 p. 33-35, 132-133) With his assistance, Defendants acquired, structured, promoted, sold, developed and produced those prospects. (R.34: OESTERLE Dep. pp. 71-75)

Through Plaintiff's efforts, Defendants have acquired from Ward Lake Drilling, Inc., under and pursuant to a "Master Agreement" dated February 1, 1989 (R.78: Exhibit 1 to HANDELSMAN Dep. of 1/23/91) the following interests in the following oil and gas drilling prospects:

A. 50% of the Charlton 9 Prospect (R.78: Exhibit 2 to Handelsman Dep of 1/23/91);

B 75% of the Chester 18, Stage I Prospect (R.78: Exhibit 3 to Handelsman Dep of 1/23/91);

C. 75% of the Chester 18, Phase II Prospect (R.78: Exhibit 8 to Handelsman Dep of 1/23/91);

D. 50% of the Charlton 30-31 Prospect (R.78: Exhibit 4 to Handelsman Dep of 1/23/91);

E. 25% of the Hayes 12 Prospect (R.78: Exhibit 7 to Handelsman Dep of 1/28/91);

F. 50% of the Charlton 2 Prospect (R.78: Exhibit 6 to Handelsman Dep of 1/23/91);

G. 50% of the Charlton 5-8 Prospect (R.78: Exhibit 5 to Handelsman Dep of 1/23/91);

H. 25% of the Chester 22 Prospect;

I. 25% of the Chester 27 Prospect;

J. 25% of the Charlton 11, Phase II Prospect; and

K. 40% of the Charlton 35 Prospect;

HANDELSMAN was at the time of his introduction to Plaintiff a neophyte in the business of exploration for and production of Antrim gas reserves in Michigan. His only foray into that area had been a resounding failure. (R. 34: OESTERLE Dep. pp. 38-45) HANDELSMAN of course blamed one of his advisors for that failure. His relationship with that advisor terminated, almost comically, in a fisticuffs. (R. 76, 77: BARTLEY Dep. of 1/22/91 p. 84) At

HANDELSMAN's request, OESTERLE thereafter enlisted Plaintiff's aid to attempt to salvage the substantial investment of time and money in that first crusade. (R. 34: OESTERLE Dep. pp. 38-45) BARTLEY's capabilities in that regard are conclusively demonstrated by the results of his endeavors.

Although HANDELSMAN doesn't remember it, Defendants have conveyed all of their right, title and interest in and to said prospects to third parties, without the knowledge or consent of Plaintiff herein. (R.78: HANDELSMAN Dep. of 1/23/91, p. 112 and Exhibits 16, 17, 18 & 19 thereto.) Some of those conveyances were made as recently as March of 1991. (R.102 and 103: ASHTON Dep. pp. 74-75 and Exhibits 14, 15 and 16 thereto)

Some monies were paid by HVG to Plaintiff covering his $2,000 monthly draw and his expenses. (R.33: BARTLEY Dep. of 8/29/90 pp. 129-131) Defendants have, however, refused to transfer to Plaintiff the 10% carried interest

agreed upon. (Plaintiff's Complaint Paragrap
13)

Of the three venturers engaged in HVG, tw
of them, Plaintiff and OESTERLE, specificall
recall their agreement of association a
hereinabove described. (R.33: BARTLEY Dep. o
8/29/90 p. 115, and 129-131 and Exhibit
thereto, p. 13; and R.34: OESTERLE Dep. pp. 45
55) HANDELSMAN, who has obtained title to al
of the prospects in question, says that he ha
no recollection of the discussions an
agreements resulting in formation of th
venture. (R.27: HANDELSMAN Dep. of 7/6/90 p
32, 42-49, 52-54, and 92)

OESTERLE, whose character Defendants no
disparage, was HANDELSMAN's joint ventur
partner, serving as Managing Director of HVG
He virtually ran that enterprise with BARTLEY'
assistance. As appears from the written Joi
Venture Agreement pertaining thereto, HANDELSM
agreed to pay OESTERLE $120,000 per year f
those services. (R. 34: OESTERLE Dep

xhibit 1)

At the taking of his deposition early in hese proceedings, HANDELSMAN produced a copy of fully executed joint venture agreement and estified unequivocally that the "HANDELSMAN ENTURE GROUP" referred to therein, is defunct, ever acquired any assets, and never conducted ny business. (R.27: HANDELSMAN Dep. of 7/6/90, p. 10-17) HANDELSMAN unequivocally denies that ny other "HANDELSMAN VENTURE GROUP" ever came nto existence. (R.27: HANDELSMAN Dep. of /6/90, pp. 19-22) His testimony is belied by he fact that "HANDELSMAN VENTURE GROUP" in hich he is a "Partner" acquired substantial articipatory interests in oil and gas projects rom Trendwell Oil Corporation by document dated uly 6, 1988 (R.75: Exhibit 2 to MALL Dep.) and rom Ward Lake Energy, Inc., via "Master greement" dated February 1, 1989 (R.78: xhibit 1 to HANDELSMAN Dep. of 1/23/91). ARTLEY aided substantially in negotiation of he "Master Agreement". (R.92: DUDLEY Dep. pp.

59-60; R.33: BARTLEY Dep. of 8/29/90, Exhibits 5, 6, 7 & 11) It was executed on behalf of HVG by OESTERLE as its "Managing Director". HVG also has and uses company checking accounts and letterhead. (R.78: Exhibit 8 to HANDELSMAN Dep. of 1/23/91; R.34: Exhibits 4 and 10 to OESTERLE Dep.)

The documents by which the venture acquired its interest in the Trendwell Project were executed by Mr. BARTLEY as "Agent" for HVG. HVG acquired title to that property and HANDELSMAN executed a Division Order covering that interest as a "Partner" of HVG on June 12, 1989. (R.75: Exhibit 21 to MALL Dep.) With respect to this project, BARTLEY acquired a 10% interest which HVG paid for, making the same a "carried" interest. (R.75: MALL Dep. pp. 18-19, 27-30, 35; R.33: BARTLEY Dep. of 8/29/90 p. 90) BARTLEY was paid nothing for his efforts by Trendwell, and did not act as a "finder" for that company. (R.75: MALL Dep. p. 70-71; R.33: BARTLEY Dep. of 8/29/90 pp. 121-122)

In conversations with Plaintiff, HANDELSMAN as admitted the existence of the joint venture s alleged by BARTLEY. (R.33: BARTLEY Dep. of /29/90 pp. 17-21) At least one of those dmissions is preserved on a tape recording of ANDELSMAN. (R.33: BARTLEY Dep. of 8/29/90, xhibit 4) HANDELSMAN made similar admissions o witness Wolfson. (R.82: WOLFSON Dep. pp. 26-7)

HANDELSMAN, OESTERLE and BARTLEY, made it lear to those with whom they conducted the usiness of HVG that the they were principals in onjunction with that business. (R.80: LINDA ARTLEY Dep.; R.92: DUDLEY Dep. p. 48; R.82: OLFSON Dep. pp. 26-27; R.75: MALL Dep. pp. 50-2, 55-58; R.94: GEORGI Dep. pp. 11, 13, 15; .85: KOSTRZEWA Dep. pp. 8-9)

The relationship of the parties and their espective participatory interests in HVG were ummarized in writing, by HANDELSMAN in late 989, showing Plaintiff to have a 10% carried nterest therein. (R.102, 103: ASHTON Dep. pp.

49-59 and Exhibit 6 thereto)

Given the foregoing factual circumstances, witness KOSTRZEWA has concluded that, based upon industry practices and standards, the parties arrived at an agreement whereby Plaintiff is entitled to a 10% carried interest in the Ward Lake Project or the cash equivalent thereof. (R.85: KOSTRZEWA Dep. pp. 15-31)

REASONS FOR GRANTING THE WRIT

The Judgment of the United States Court of Appeals for the 6th Circuit should be reviewed by this Court because, as hereinafter discussed, it has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Furthermore, its decision concerning application of the law of Summary Judgment herein conflicts with applicable decisions of this Court and other United States Courts of Appeals. (SCR 10) Both the District Court and

he 6th Circuit Court of Appeals went to extreme nd unjustified lengths to dismiss Petitioner's omplaint without a trial.

The Court of Appeals Erred in Granting Summary Judgment on an Alternative Basis

After agreeing with BARTLEY and ruling that he District Court erred in holding that he ould not be a joint venturer under Michigan aw, the Court of Appeals went on to affirm the istrict Court's grant of Summary Judgment on ther grounds under the authority of Hansard v. arrett, 980 F 2d, 1059, 1061 (6th Circuit, 992).

In so ruling, the Court of Appeals found nat BARTLEY had failed to adequately define or xplain the interest he claims in this suit, nough he had an adequate opportunity to do so. ne Court erred on both points. As set forth in ARTLEY's Appellate Briefs, the issue on appeal o the Court of Appeals was a narrow one. either of the parties briefed or argued, nor id the Court of Appeals inquire on Oral rgument or at any other stage, into the

sufficiency of BARTLEY's definition of the interest that he claims.

Because BARTLEY did not have a realistic opportunity to respond to the "new theory" upon which the Court of Appeals seized in making its ruling, it had no authority to grant Summary Judgment under the Hansard case.

BARTLEY has Not Failed to Adequately Define or Explain the Interest He Claims in this Suit

The Court of Appeals recognized that in his Verified Complaint BARTLEY claimed that he and Handelsman agreed that he would be compensated, in part, by a 10% "carried interest" in and to all oil and gas drilling prospects introduced by him and acquired by HVG. In Count I of that Complaint, which is founded upon "Breach of Contract and Joint Venture Fiduciary Duties", Plaintiff prayed for Judgment against Defendants for 10% of the "gross proceeds of production" from all oil and gas drilling prospects introduced by Plaintiff to the Venture. In Count II of that Complaint, which sounds in "Quantum Meruit", Plaintiff states that the

"fair value of the services rendered" by him for Defendants is "10% of the gross proceeds realized from production" from the oil and gas prospects introduced by him. He asks for an award of that value in his prayer to Count II.

In testimony, BARTLEY stated that he was to receive a perpetual 10% of the cash flow from all successful prospects that he introduced to the Venture and that he would not be liable for any of the Venture's costs or losses. He demonstrated, through submission of Handelsman Venture Group's Accounting Ledger (Joint Appendix, Page 248), that he received precisely that interest in conjunction with the Trendwell prospect which he introduced to the Venture contemporaneously with the Ward Lake prospect.

At Page 10 of his Brief to the Court of Appeals, Petitioner quoted from Williams' and Meyers' treatise on oil and gas law, the definition of a "carried interest." The Court of Appeals went astray in its analysis when it equated a "permanent carried interest" with a

"net profits interest." Perhaps in arguing the point, the undersigned should have quoted further from Williams' and Meyers' Manual of Oil and Gas Terms Annotated. Reference to the definition of a "permanent carried interest" as set forth therein discloses that the same is "treated as the equivalent" of a net profits interest "for tax purposes" only. [See definition at page 28 of the Appendix. See also 2 Williams & Meyers, Oil and Gas Law, §424.1, Page 445, a copy of which appears at page 29 of the Appendix.] The concept of a net profits interest was discussed at Page 10 of BARTLEY's Brief to the Court of Appeals only for the purpose of analogy and distinction.

BARTLEY has consistently testified and alleged under oath that his "10% carried interest" entitles him to 10% of the gross proceeds of production from the leasehold interests acquired by the Venture, for the life of those leases. The burden of the costs of drilling, completing and operating the wells or

those leases, by definition and testimony, is to be borne solely by Defendants as the "carrying party" and reimbursed out of proceeds of production attributable to their leasehold interest, if any. In negotiating this arrangement with Handelsman, BARTLEY insisted on a carried interest because he recognized that he would have no control over "how profits were determined." (Joint Appendix, Page 353)

Based upon his testimony and allegations, BARTLEY is entitled to payment of 10% of the gross proceeds of production from all wells situate upon leases introduced by him to the Venture commencing on the date of first production therefrom, and continuing for the life of those leases. All costs associated therewith are to be borne by Handelsman. Such an interest is distinguished from a "net profits interest" in that the latter is a percentage or fractional share of the proceeds of production from a property measured by the net profits generated thereby. That is to say, a portion of

the proceeds of production remaining after payment of all costs associated with generating that production. The distinction is that the proceeds attributable to BARTLEY's carried interest are payable without regard to the profitability of the well or wells.

The two types of oil and gas leasehold interest are analogous from a tax standpoint as discussed by Williams and Meyers, since the recipient of both is entitled to a stream of cash which is net income to the recipient. However, the volume of that cash flow differs in that the recipient of a permanent carried interest receives a substantially greater income from any given level of production.

As appears from the foregoing, BARTLEY has neither confused the concepts nor contradicted himself. He seeks Judgment for the monetary value of his oil and gas leasehold interest which is "10% of the gross proceeds of production" from all oil and gas drilling prospects introduced by him to Defendants.

The Court of Appeals erred by equating the terms "permanent carried interest" and "net profits interest" for all purposes when the latter was discussed only analogously by counsel for BARTLEY in an attempt to aid the Court of Appeals in understanding the testimony and sworn allegations concerning the definition of the interest the parties agreed to. The Court of Appeals has confused the terms by construing them to be synonymous. That confusion was apparently created by Appellate Counsel's failed attempt to compare and contrast those terms in briefing the issue.

As observed by Dissenting Judge Contie, BARTLEY proffered his interest in the Trendwell prospect, as accounted for by Defendants (Joint Appendix, Page 248), as definitive of the interest to which he is entitled in the Ward Lake prospect.

While Defendants vehemently deny any agreement whatsoever with BARTLEY, their actions in so accounting for his interest in the

Trendwell prospect speak louder than their words.

The words and conduct of the respective parties clearly demonstrate sufficient "meeting of the minds" to establish an express contract or a contract implied in fact to pursue a joint venture, as asserted and argued hereafter.

Even the Respondents have not and do not argue that Petitioner has failed to assert an agreement whereby he would bear none of the loss, cost or expense of the venture. They assert the contrary. As stated at Page 3 of their Reply Brief (R.100):

> "plaintiff has been insistent that he was neither to share in any losses (such as the Otsego project) nor in any liability for potential losses or expenses. . . . plaintiff only claims the **benefits** of a joint venture agreement while specifically denying any of the burdens of a joint venturer. (04/29/91 BB, 177.) . . . According to the plaintiff, he was to receive his $2,000 monthly salary regardless of whether the joint venture fared well or poorly (03/29/90 BB, 130-134; 01/22/91 BB, 151-153); furthermore, he was only to be a joint venturer as to profits, not as to losses (04/29/91 BB, 177). In contrast to this, defendant

Handelsman was exposed to severe personal liability, since he laid out vast sums of his own money without any guarantee of it being recouped through the sale of limited partner interests. (01/23/91 RH, 83-87.)"

ARGUMENT I

The Court of Appeals erred in granting Summary Judgment as to Count I

Definition of Joint Venture

Case law in Michigan has defined a joint venture as "an association to carry out a single business enterprise for profit." It has six (6) elements:

1. An agreement indicating an intent to undertake a joint venture;
2. A joint undertaking of;
3. A single project for profit;
4. A sharing of profits as well as losses though liability for losses or expenses may be affected by the terms of the contract;
5. A contribution of skill or property by the parties; and
6. Community of interest and some control over the subject matter of the enterprise.

Goodwin v S.A. Healy Co., 383 Mich 300, 308-309 (1970); Summers v Hoffman, 341 Mich 686,

692, (1955); Grabendike v. Adix, 335 Mich 128, 139 (1952); Hathaway v Porter Royalty Pool, Inc., 296 Mich 90, 102-103 (1941); Reed & Noyce, Inc. v Municipal Contractors, Inc., 106 Mich App 113, 117 (1981).

The Michigan Supreme Court early on decided that projects for the development of oil wells are joint ventures, imposing upon the parties thereto strict obligations of good faith and fair dealing toward each other. Johnson v Ironside, 249 Mich 35, 44-46 (1929). Between joint venturers, the law imposes the highest degree of integrity, full disclosures and fairness. 15 Callaghan's Michigan Civil Jurisprudence, Joint Adventurers, § 19 N. 1, p. 235; 2 Williams & Meyers, Oil and Gas Law, § 437.1 p. 522.1-523, and authorities cited therein. In the words of Justice Cardozo,

> "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the

market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exemptions. Wendt v Fischer, 243 N.Y. 439, 444, 154 N.E. 3030. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." Meinhard v Salmon, 164 N.E. 545, 546-47 (1928).

The Michigan Supreme Court has embraced and adopted the Meinhard reasoning. VanStee v Ransford, 346 Mich 116, 126-128 (1956). In the case of Lane v Wood, 259 Mich 266, 269 (1932) it stated:

> "Within the scope of the enterprise they stand in a fiduciary relation each to the other, and are bound by the same standards of good conduct and square dealing as are required between partners. This obligation begins with the opening of the negotiations for the formation of the syndicate, applies to every phase of the business which is undertaken, and continues until the enterprise has been completely wound up and terminated." (Emphasis Added.)

The managing partner in a joint venture, in particular, owes a fiduciary duty to the other

participants, and is prohibited from acquiring for his own benefit any interest on the basis of information obtained in the performance of his duties as such. He holds any interest so acquired in constructive trust for the benefit of the venturer entitled thereto. 2 Williams & Meyers, Oil and Gas Law, § 437.1 p. 522.1-523, and authorities cited therein.

Necessity of a Written Contract

Quite clearly, the joint venture asserted by Petitioner herein does not require a writing. In fact, in a case strikingly similar to the one at bar, the Michigan Supreme Court in Summers v Hoffman, 341 Mich 686, 690, 692 (1955), concluded that the dealings of the parties contemplated by their oral agreement constituted a joint venture.

Meeting of the Minds

Whether the parties to this cause created the relationship of joint venturers depends upon their intent. 15 Callaghan's Michigan Civil Jurisprudence, Joint Venturers, § 9, N. 2, p.

227, and authorities cited therein. The parties' intentions are to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts. 15 Callaghan's Michigan Civil Jurisprudence, Joint Ventures, § 9, N. 4, p. 228, and authorities cited therein.

The oft stated rule that a contract requires a "meeting of the minds" is only a figurative way of saying that there must be mutual assent. The existence of the parties' intent in this regard is judged by an objective, not a subjective standard, looking to the expressed, not the unexpressed words of the parties, and their visible acts. 5 Callaghan's Michigan Civil Jurisprudence, Contracts, § 24, N. 7 & 8, p. 589, and § 158, pp. 719-722, and authorities cited therein.

Oral contracts are to be regarded in light of the circumstances surrounding their execution and should be construed to effectuate the intent of the parties at the time. Redinger v Standard

Oil Company, 6 Mich. App. 74, 79 (1967). Where the proofs rest on imperfect recollections, and there is opportunity for misunderstanding, courts should incline to charitable views in construing parol contracts and ascertaining the motives and intentions of the parties. A parol contract is not to be defeated merely on the ground that informal circumstances surround the transaction. Refusal to reduce an oral contract to writing will not have the effect of rendering nugatory an otherwise valid agreement. Callaghan's Michigan Civil Jurisprudence Contracts, § 157, p. 718, and authorities cited therein.

While the facts herein related are certainly sufficient to demonstrate the existence of an express parol agreement between the parties, they also demonstrate quite clearly all of the elements necessary to establishment of a contract implied in fact.

Implied contracts are those which arise under circumstances which, according to the

ordinary course of dealing and common understanding of persons, show a mutual intention to contract. There are two kinds of implied contracts, one implied in fact, and the other implied in law. A contract implied in fact does not exist unless there is a "meeting of the minds" between the parties by reason of their words or conduct. The second is quasi or constructive, and does not require a "meeting of the minds", but is imposed by fiction of law to enable justice to be accomplished, even if no contract was intended. The essential element of a quasi-contractual obligation, on which a recovery may be had, is the receipt of a benefit by a defendant from a plaintiff, which it is inequitable for the defendant to retain. The theory to be applied is that of unjust enrichment. 5 Callaghan's Michigan Civil Jurisprudence, Contracts, § 273, and § 274, pp. 834-836, and § 282, pp. 846-848, and authorities cited therein.

Whenever a benefit accrues to a party,

whether for services rendered or otherwise, on which a duty to make compensation arises, the law will in the absence of an express promise to make compensation, imply one from the transaction. 5 Callaghan's Michigan Civil Jurisprudence, Contracts, §281, p. 844, and authorities cited therein.

The Court herein is confronted with a set of factual circumstances under which it may find:

1. An express contract as alleged by BARTLEY arising out of the specific words and actions of the parties;

2. A contract implied in fact arising out of the conduct of the parties the language used by the parties in discussing their relationship; and by the circumstances surrounding the transaction; or

3. A contract implied in law arising out of the words and actions of the parties and the circumstances, providing for a recovery in quantum meruit, if it concludes that no express or implied contract existed. 5 Callaghan's Michigan Civil Jurisprudence, Contracts, § 275, N. 10, pp. 837-839, and authorities cited therein.

Both the Trial Court and the Court of

Appeals, in their rulings, went outside the adversarial issues presented by the parties in Defendants' Motion for Summary Judgment and deprived BARTLEY of an opportunity to meaningfully respond to the basis for those decisions.

BARTLEY has repeatedly and consistently asserted that, at their original meeting at Weber's Inn in Ann Arbor, he and HANDELSMAN agreed that, as compensation for his participation in the joint venture, he was to receive a 10% "**carried**" interest in all oil and gas drilling prospects introduced by him and acquired by the venture. (Sworn Complaint, Paragraphs 10, 13 and 17; R.33: BARTLEY dep. of 8/29/90, p. 31-33, 115-116; R.76, 77: BARTLEY dep. of 1/22/91, p. 139-143, 153-159, 161-168, 176-178, 181-183 and 223-224) Witness Oesterle supports BARTLEY's recitation of the agreement reached at Weber's Inn. (R.33: Exhibit 1, p. 11-14 of BARTLEY dep. of 8/29/90; R.34: OESTERLE dep. p. 45-54, 62-63, 71, and 98-104) BARTLEY

has consistently so argued herein. (R. 31: Plaintiff's Brief Opposing Defendants' (first) Motion for Summary Judgment, p. 1, 2 and 3; R.97: Plaintiff's Brief Opposing Defendants' (second) Motion for Summary Judgment, p. 1, 2 and 4; R.126, 131: Transcript of 8/8/91, p. 7)

In defining the term for defense counsel, BARTLEY explained in his own words that his interest being "**carried**" meant that he would bear no such losses, costs or expenses. (R.33: BARTLEY dep. of 8/29/90, p. 31-33) By the same token, if the leases acquired by the joint venture were unproductive, BARTLEY would have a carried interest in nothing. (R.83: BARTLEY dep. of 4/29/91, p.177; R.34: OESTERLE dep. p. 103-104)

HANDELSMAN admitted on tape that BARTLEY had been given a 10% carried interest in the Trendwell project. (R.33: Exhibit 4 to BARTLEY dep. of 8/29/90) HANDELSMAN paid for that interest. (R.75: MALL dep. p. 18-19, 27-29, 35) HANDELSMAN accounted for that interest as a cost

free "carried" interest. (R.102, 103: ASHTON dep. p. 49-59 and Exhibit 6 thereto.)

The term "carried interest" is a term of art employed in the oil and gas industry. HANDELSMAN demonstrated a working understanding of the term. (R.76, 77: BARTLEY dep. of 1/22/91, p. 157, 164-165 and 181-183)

A "carried interest" is defined as follows:

> "A fractional interest in oil and gas property, usually a lease, the holder of which has no personal obligation for operating costs, which are to be paid by the owner or owners of the remaining fraction, who reimburse themselves therefor out of production, if any. The person advancing the costs is the carrying party and the other is the carried party." 8 Williams & Meyers, Oil and Gas Law, Manual of Oil and Gas Terms Annotated, p. 113-116; 2 Williams & Meyers, Oil and Gas Law, § 424, Page 437.

A "permanent carried interest" is a carried interest which is to be carried for the life of the lease. It is treated as the equivalent of a net profits interest. 8 Williams & Meyers, Oil and Gas Law, Manual of Oil and Gas Terms Annotated, p. 701-702.

A "net profits interest" is a share of gross production from a property, measured by net profits from operation of the property. It is carved out of the working interest. 8 Williams & Meyers, Oil and Gas Law, Manual of Oil and Gas Terms Annotated, p. 600.

Applying the terms used by the parties herein to define their joint venture, it becomes clear that BARTLEY's interest was intended by all to be a permanent carried interest. BARTLEY was the "carried party" and HANDELSMAN was the "carrying party". By definition, BARTLEY was to have no liability for any of the losses, costs, or expenses of the venture and HANDELSMAN was to bear all of the same.

Nonetheless, as a matter of fact and law it cannot be said that, under the agreement asserted, BARTLEY bore no risk of loss whatsoever. The logic employed by the Michigan Supreme Court in the Summers v Hoffman case is instructive in this regard. The Defendants therein presented virtually the same argument

as HANDELSMAN does here. At Page 693 of the Summers Opinion appears the following pertinent passage:

> "But defendants claim that under the agreement plaintiff would not share any losses or bear the risk of loss in case of an adverse decision in the suit involving the title to the property. With this contention we cannot agree. 'Loss' does not necessarily mean 'monetary loss.' If the land was eventually sold at a loss the result would be that plaintiff's expenditure of time would have been for naught as would defendants' monetary investment. If the title litigation had been decided adversely then plaintiff would have lost large out-of-pocket expenses and the value of the time which he had theretofore spent on the project which, while not quite as concrete or measurable as defendants' cash investment, is nevertheless a loss. It cannot be said that the plaintiff did not share any risk of loss, for as we said in Hathaway v Porter Royalty Pool, Inc., supra (Page 103):
>
> > 'Though the liability of a joint adventurer for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the contract.' "

The Michigan Supreme Court in the Summers case charted the legal course which, if

navigated properly by this Court, will lead to judgment in favor of BARTLEY.

While the facts and legal arguments in the Summers case bear striking similarity to those at bar, the Michigan Supreme Court decision in the case of Grabendike v Adix, 335 Mich 128 (1952) is also instructive. In that case the Michigan Supreme Court specifically held that a carried interest arrangement in an oil and gas transaction, similar to that involved here, constituted a joint venture. Grabendike v Adix, 335 Mich 128, 131 and 139-140 (1952).

Joint Venture Elements

Assessing the factual record herein developed in a light most favorable to BARTLEY, one must conclude that the parties did in fact arrive at an agreement whereby they intended a joint undertaking to acquire, promote, and manage interests in oil and gas drilling programs in Otsego County, Michigan, for profit. (Joint Venture Elements 1, 2 and 3.) BARTLEY performed all of his responsibilities in that

respect and did in fact acquire his agreed upon interest in the Trendwell Prospect, which HANDELSMAN paid for. Respondents' argument that BARTLEY was somehow acting as a "finder" or "factor" for Trendwell Oil in securing that interest is belied by the record. (R. 75: MALL Dep. pp. 70-71; R. 33: BARTLEY Dep. of 8/29/90 pp. 121-122)

There is also little room for argument that the fifth element of a joint venture as set forth above exists here. BARTLEY early on contributed his resources, skill and effort in locating and bringing to the venture reputable and capable operators with good drilling prospects and long term commitments from utilities to purchase any gas produced. After fulfilling his responsibility to his partners by locating and introducing those prospects to the venture, he went the extra yard and participated extensively in the negotiation and formalization of the terms of acquisition of those prospects by the venture. As agreed by the parties,

HANDELSMAN contributed financially to the acquisition of the prospects in question. At no time was BARTLEY expected to contribute financially thereto.

That the parties have a community of interest and some control over the Trendwell and the Ward Lake Prospects is without doubt. (Sixth Element) That community of interest and control was divided 90/10 between HANDELSMAN and BARTLEY. The value of BARTLEY's interest in HVG is directly and proportionately related to prospects acquired by the venture. BARTLEY's degree of control over the subject of the enterprise is clearly demonstrated by the incident referred to at page 26 of Respondents' Brief to the Court of Appeals. When HANDELSMAN proposed to transfer all of the interest acquired by HVG in the Trendwell Prospect to a limited partnership, BARTLEY asked of his partners the logical question: "What am I to be paid for my share?" The answer was "$10". HANDELSMAN expected BARTLEY to transfer his

vested interest in the Trendwell Prospect to a limited partnership entity controlled by HANDELSMAN with virtually no present or future consideration flowing to BARTLEY. Not surprisingly, BARTLEY refused to do so. HVG was, for that reason, unable to commit its entire interest in the Trendwell Prospect to the proposed limited partnership. (R. 33: BARTLEY Dep of 8/29/90 pp. 86-89; R. 76, 77: BARTLEY Dep. of 1/22/91 pp. 172-175)

To the limited extent that Respondents address the sixth element of a joint venture, they seem to argue that BARTLEY must be able to demonstrate that he and his alleged venturers jointly acquired legal title to the prospects which were the subject of the venture. That argument is clearly wrong. The Summers decision does not so provide. A joint interest in title to the Ward Lake Prospect, or the value thereof, is the **relief** prayed for herein by Plaintiff.

Plaintiff in the Summers v Hoffman case sought the same type of relief. In that case,

two parcels of real estate were involved. Defendant and Plaintiff had taken joint ownership of one of the parcels (as in the case herein with the Trendwell Prospect). The parcel which Defendants acquired in their name only was at issue in that case (as is the Ward Lake Prospect herein). Respondents' attempts to distinguish the factual situation involved in the Summers decision from the case at bar must fail. The more one analyzes the factual situation involved therein, the more it appears to match the circumstances of the current controversy. As sated in BARTLEY's Brief to the Court of Appeals, that case will guide this Court to the unavoidable conclusion that he must prevail herein.

I have reserved until now discussion of the fourth element of a joint venture as defined by Michigan law. It is dealt with last only because the Decision appealed to the Court of Appeals rested very narrowly on the existence of that element. Virtually all of BARTLEY'

arguments in that appeal revolve around factual and legal issues pertaining thereto. Respondents dedicated little argument to that issue and cited no Michigan authority whatsoever in support of their position thereon.

Both BARTLEY and OESTERLE have testified at length that it was the agreement of the parties that BARTLEY would not bear any of the losses, costs, or expenses of the venture because his share of the leases to be acquired was to be a "carried interest". Respondents accepted that proposition as true, but argued that such an arrangement operates to defeat a joint venture relationship between the parties. The only law cited in support of their position is the Texas case of Brown v Cole,. 291 S.W. 2d 704, 709 (1956, aff'd 291 S.W. 2d 704 (1956) [SIC]; 59 ALR 2d 1011 (1956) an the Louisiana case of Frazell v United States, 213 F. Supp 457 (W.D.La., 1963), in dicta. In alluding to Michigan law at page 37 of their Brief to the Court of Appeals, Respondents asserted without

citation of authority, that:

> "the case law does not say that a joint venturer may completely **excuse** himself from sharing in the losses, only that the terms of the contract may **affect** it."

Respondents' reliance upon the Texas and Louisiana decisions is misplaced. Their argument concerning the status of Michigan law is simply wrong.

The law pertaining to joint ventures seems to vary in substantial degree from state to state. Some jurisdictions have held that a duty to share losses must exist before a joint venture can. However, a substantial number of other jurisdictions have held that the sharing of losses is not essential to the existence of a joint venture. 46 Am Jur 2d, Joint Ventures, § 13 p. 35-36 notes 10-15. Texas and Louisiana just happen to be two of the states which mandate a duty to share losses. The Brown v Cole case established that precedent in the State of Texas. It may be that "A majority of American jurisdictions 'look to loss sharing as an essential element of partnership or joint

venture'", a statement which Defense counsel cites as dicta in the Frazell decision. Michigan, however, is clearly not within that "majority". Decisions of the Michigan Supreme Court make it clear that the parties to a joint venture may contract away loss sharing responsibilities of the principals. Rossman v Marsh, 287 Mich 720, 729-730 (1939); Keiswetter v Rubenstein, 235 Mich 36, 44-45 (1926); Dutcher v Buck, 96 Mich 160, 166-167 (1893); Sager v Tupper, 38 Mich 258, 259, 265 (1878).

Since the joint venture agreement claimed by BARTLEY revolves around his acquisition of a "**carried interest**" in the oil and gas leases acquired by the venture, and since that term is one of art, not generally used outside of the oil and gas industry, it would appear that the conclusions of the Trial Court and the Court of Appeals arose from a patent misunderstanding of BARTLEY's legal and factual position. That error was not one of reasoning but of apprehension. It is apparent that those Courts

have not dealt as a matter of course with factual and legal circumstances involving the specialized field of oil and gas law. Their lack of familiarity with the factual and legal nuances of the oil and gas industry, it appears, precipitated the error herein complained of. Both Courts should have granted BARTLEY's Motions for Reconsideration. Instituto Nacional de Comercializacion Agricola (Indeca) v Continental Illinois National Bank & Trust Co., 576 F. Supp. 991, 1001 (1983, ND IL); Above the Belt v Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (1983, E.D. VA).

For the foregoing reasons Summary Judgment in favor of Defendants on Count I of BARTLEY's Complaint was in error and the Order therefor should be set aside.

ARGUMENT II

The Court of Appeals erred in granting Summary Judgment as to Count II

As hereinabove stated, the Court of Appeals also granted Summary Judgment in favor of Respondents on Count II of BARTLEY's Complaint.

This ruling is also erroneous.

It is clear from the record that BARTLEY invested considerable time, effort and expense to the great benefit of the Venture or HANDELSMAN, with the full knowledge and consent of HANDELSMAN. (R.33: Exhibit 1, p. 15 of BARTLEY dep. of 8/29/90; R.76, 77: BARTLEY dep. of 1/22/91, p. 151-152, 195, and 237; R.34: OESTERLE dep. p. 112-117) Under the circumstances, Defendants are estopped from asserting the Statute of Frauds in defense of Plaintiff's claim. It is well settled that the doctrine of promissory estoppel can be invoked to defeat such defenses. Clark v Coats & Suits Unlimited, 135 Mich App 87, 98 (1984). The Federal Courts of the Eastern District of Michigan have adopted the application of the law of estoppel made in the Clark case. See, Cattin v General Motors Corp., 641 F. Supp. 591, 596 (E.D. Mich, 1986).

The elements of equitable or promissory estoppel are:

1. A promise;

2. That the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee;

3. Which in fact produced reliance or forbearance of that nature; and

4. Under such circumstances that the promise must be enforced if injustice is to be avoided.

BARTLEY's claim fits precisely within the circumstances related in the Clark case. HANDELSMAN'S promise to perform in keeping with the terms of the joint venture agreed upon induced BARTLEY to commit considerable time, expense, and effort on behalf of the Venture, and resulted in a substantial financial benefit to the Venture. BARTLEY's performance derived from his reliance upon the promise made by HANDELSMAN, which under the circumstances must be enforced if injustice to BARTLEY is to be avoided.

To allow Respondents to rely upon the

Michigan Statute of Frauds to bar recovery by BARTLEY would not only defeat the legislative purpose thereof, but would allow Respondents to utilize that very statute to perpetuate a fraud.

Recognizing the foregoing, the Michigan Supreme Court in the case of Ordon v Johnson, 346 Mich 38 (1956), at pages 48-49 of its Opinion, specifically ruled that recovery on a quantum meruit theory may be had where Plaintiff has performed services under an agreement which is not otherwise enforceable because of the Statute of Frauds, or some other statute that prevents recovery on the terms of the agreement itself. See also, 11 Callaghan's Michigan Civil Jurisprudence, Statute of Frauds, § 160, p. 142, and authorities cited therein.

For the foregoing reasons, Summary Judgment on Count II of BARTLEY's Complaint was in error, and the Order therefor should be set aside.

ARGUMENT III

The Court of Appeals erred in ruling that no genuine issue of material fact exists

FRCP 56(c) provides quite clearly that summary judgment may not be rendered unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The material issue of fact existing in this cause is "Did the parties agree to embark upon the venture asserted by BARTLEY?"

The fact that the Court of Appeals was split by Senior Judge Contie's dissent on this issue shows quite clearly that the record "presents a sufficient disagreement to require submission to a jury" and that the evidence is not "so one-sided that one party must prevail as a matter of law." Street v. J.C. Bradford & Co., 886 F. 2d 1472, 1478 (6th Cir., 1989).

In ruling upon a Motion for Summary Judgment, the Court is not permitted to decide issues of fact, it may only determine whether or not issues of fact exist. Caylor v Virden, 217

F.2d 739, 741 (1955, CA 8 MO); EEOC v May & Company, 572 F. Supp. 536 (1968, ND GA).

Summary judgment should be granted only if the entire record shows the right to such judgment leaving no room for controversy, showing affirmatively that plaintiff cannot prevail under any circumstances. Prince v Pittson Company, 63 FRD 28 (1974, SD W VA).

In deliberating upon a Motion for Summary Judgment, the court must construe evidence in favor of the party opposing the motion in its most favorable light, and against the moving party. Bohn Aluminum & Brass Corp. v Storm King Corp., 303 F. 2d 425 (1962). Facts asserted by the party opposing the Motion for Summary Judgment must be regarded as true. VanHouten Service, Inc., v Shell Oil Co., 417 F.Supp 523 (1975, DC NJ).

The "economic reality" of this case is that Respondents needed BARTLEY's skills in order to pursue their Antrim drilling venture. (R.34: OESTERLE Dep. p. 42-43) Matsushita Elec.

Industrial Co., v Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Court of Appeals concluded that "BARTLEY has failed adequately to define or explain the interest he claims in this suit "(emphasis added) because of its erroneous perception of his Counsel's analysis of the term "carried interest." BARTLEY was clear on this point, the Courts below were not. In so concluding, the Court of Appeals identified a genuine issue of fact and decided that issue in favor of Respondents, giving greater credibility to Respondents denial of the fact than to Petitioner's assertion thereof. This the law of summary judgment clearly prohibits. To do so deprives BARTLEY of his claimed interest in HVG without due process of law. (U.S. Const., 14th Amend., Sec. 1)

In cases such as this where the terms of the alleged oral contract are complex and involved, the matter should be tried in its entirety, and not merely upon highlighted

questions and answers given during pre-trial discovery. Tagtmeier v. Smith, 23 FRD 32 (1958, ED Pa).

In an action for breach of contract, where the complaint sufficiently raises the issue of existence of a contract, Plaintiff is entitled to have that issue tried in an ordinary manner as an issue of fact. Aronson v. K. Arakelian, Inc., 154 F. 2d 231, 234 (1946, CA 7, Ill) See also Olympic, Jr., Inc. vs. David Crystal, Inc., 463 F. 2nd 1141, 1147 (1972, CA 3, NJ).

Subjective questions of knowledge, state of mind, or intent, are inappropriate for summary disposition. Whether the parties had knowledge of facts which should lead them to inquire as to the existence of a contract involved a subjective question of knowledge which must await consideration by the finder of fact. Runyan v. United Brotherhood of Carpenters, 566 F. Supp. 600, 607 (1983, DC Colo)

Summary Judgment is an extreme remedy and should not be entered unless the movant has

established that he has the right to Judgment, and that the other party is not entitled to recover, under any discernable circumstances. Ozark Milling Company, Inc. v. Allied Mills, Inc., 480 F. 2d 1014, 1015 (1973, CA 8, Ark).

In this case it was incumbent upon Respondents' as moving party to convince the Court that no facts exist herein which establish formation of the oral agreement alleged by BARTLEY. As hereinabove set forth, the record is replete with facts which would establish the existence of such an agreement. Accordingly, Respondents' Motion for Summary Judgment should have been disallowed by the Court of Appeals. Gertner v. Hospital Affiliates International, Inc., 602 F 2d 685, 689 (1979, CA 5, Tex).

The Court of Appeals should have applied the same standard as the Trial Court in reviewing its decision to grant Summary Judgment. Summary Judgment is an extreme and treacherous remedy and should not be entered unless the pleadings, stipulations, affidavits

and admissions show that there exists no genuine issue as to any material fact, unless the movant has established its right to judgment with such clarity as to leave no room for controversy, and unless the other party is not entitled to recover under any discernable circumstances. Vette Company v. Aetna Casualty & Surety Company, 612 F 2d 1076, 1077 (1980, CA 8, MO).

This standard of review is a rigorous one and not even one chink in the armor of the Court's decision can be vulnerable to question. Taking facts and inferences most favorable to the losing party, the question is whether the trier of fact nevertheless would have to find against him. Rogen v. Ilikon Corp, 361 F 2d 260, 266 (1966, CA 1, MASS).

Likewise, the Supreme Court looks at the record on Summary Judgment in a light most favorable on the party opposing the motion. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491 (1962). See also United States v. Diebold, Inc., 369

U.S. 654, 655 82A S. Ct. 993, 994 (1962).

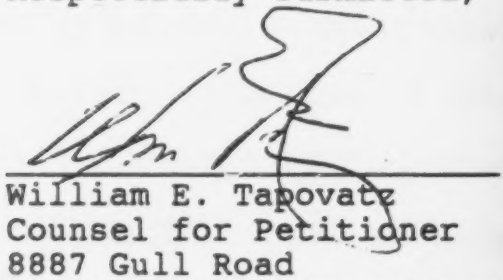
Applying the law of Summary Judgment to the facts hereinabove related, it is clear that Respondents' Rule 56 Motion for Summary Judgment should have been denied.

CONCLUSION

For the foregoing reasons, BARTLEY respectfully prays that his petition for a writ of certiorari be granted.

DATED: July 28, 1993.

Respectfully Submitted,



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